STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Wilder, PJ, Holbrook and McDonald, JJ

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSIE B. JOHNSON,

Defendant-Appellant.

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Supreme Court No. 118351

Court of Appeals No. 219499

Oakland Circuit Court
No. 92-115814-FH

BRIEF OF ATTORNEY GENERAL AS AMICUS CURIAE

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QUESTION PRESENTED FOR REVIEW

I.

Should the Michigan Supreme Court adopt the federal subjective test for entrapment?

STATEMENT OF JURISDICTION

Amicus adopts the statement of jurisdiction of Plaintiff-Appellant, People of the State of Michigan.

STATEMENT OF FACTS

Amicus adopts the statement of facts of Plaintiff-Appellant, People of the State of Michigan.

ARGUMENT

I. Amicus Attorney General urges this Court to retain the objective test of entrapment as set forth in *People v Jamieson*, 436 Mich 61; 461 NW2d 884 (1990) (Brickley, J.).

A. Standard of Review

The defendant has the burden of proving by a preponderance of the evidence that he was entrapped. *People v Juillet*, 439 Mich 34, 61; 475 NW2d 786 (1991). The trial court must make specific findings of fact on the entrapment issue and its findings will be reviewed on appeal under the clearly erroneous standard. *Id.* The reviewing court is not to "substitute [its] judgment for that of the trial court." *People v Martin,* 199 Mich App 124, 125; 501 NW2d 198 (1993).

B. Discussion

1. **Introduction and overview.**

Entrapment is one of the most divisive areas of criminal law for appellate courts. The first four major decisions of the United States Supreme Court dealing with entrapment, spanning a 44 year period, closely divided the Court on which test of entrapment—subjective or objective—the Court should adopt.[1] In each case, the majority chose to adopt the subjective test or to continue to use it. The dissent in each case, however, presented a passionate plea for adopting the objective test. Clearly, the type of test used to measure entrapment is one on which reasonable jurists can differ. And Michigan is no exception.

The Michigan Supreme Court was the first court in the United States to originate the concept of entrapment in 1878. In *Saunders v People*, 38 Mich 218 (1878), Justices Marston and

[1] *Sorrells v United States*, 287 US 435, 454; 53 S Ct 210; 77 L Ed 413 (1932), *Sherman v United States*, 356 US 369, 372; 78 S Ct 819; 2 L Ed 2d 848 (1958), *United States v Russell*, 411 US 423; 93 S Ct 1637; 36 L Ed 2d 366 (1973); *Hampton v United States*, 425 US 484; 96 S Ct 1646; 48 L Ed 2d 113 (1976)

Campbell concurred in the judgment of the Court to condemn police conduct that they deemed "reprehensible." [2] But it was not until 1941 that this Court formally adopted the defense of entrapment. *People v Mitchell*, 298 Mich 172; 298 NW 495 (1941). In 1973, this Court in *People v Turner*, 390 Mich 7; 210 NW2d 336 (1973) adopted the objective test of the entrapment defense, relying in large measure upon Justice Stewart's dissenting opinion in *United States v Russell, supra.*

By 1989, this Court presumably had questioned the wisdom of using the objective test because in that year, the Court directed the parties in a case before it "to submit supplemental briefs with regard to whether we should abandon the objective entrapment test in preference to the subjective test. 433 Mich 1226 (1998)." *People v Jamieson*, 436 Mich 61, 65; 461 NW2d 884 (1990). This Court later concluded that "there is not sufficient justification or need to change a well-settled principle of law in this state," and retained the objective test, albeit with modifications by incorporating some elements from the subjective test. *Id.*

What appeared to be a "well-settled principle of law" to the Court in 1990, became anything but settled one year later in *People v Juillet, supra.* In 1991, this Court in *Juillet* decided another entrapment case, and again reformulated the objective test. The decision in *Juillet*, however, produced four separate opinions, such that an analysis of the various (and often conflicting) positions could produce four votes in support of a new entrapment test. That is precisely what the Court of Appeals panel in *People v Fabiano*, 192 Mich App 523, 526; 482

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[2] In *Saunders*, the defendant had approached policeman Webb and asked that the policeman leave the courtroom door unlocked so that the defendant might enter after hours. Viewed in today's perspective, it cannot be said that this fact situation depicts "reprehensible" police conduct especially where the idea for the crime did not originate with the police, the police did not manufacture or instigate the crime, and they did nothing more than offer the opportunity to commit the crime. *Jamieson* at 88-89; *People v Griffin*, 187 Mich App 28, 30; 466 NW2d 712 (1991). What the Court found "reprehensible" in *Saunders* essentially was that the police did not prevent the commission of the defendant's crime! *Saunders*, 38 Mich at 222.

NW2d 467 (1992), lv den 439 Mich 1002 (1992), did when it discerned the essence of the new entrapment test in *Juillet*:

> [W]e conclude that a careful reading of the justices' various opinions indicates that *Juillet*, while continuing to adhere to an objective test, does change the nature of that test. Specifically, we conclude that four justices would find entrapment if (1) the police engaged in impermissible conduct that would have induced a person similarly situated as the defendant, though otherwise law-abiding, to commit the crime, *or* (2) the police engaged in conduct so reprehensible that it cannot be tolerated by the Court.

(Footnotes omitted) (emphasis in the original).

The "new" test in *Juillet* is basically the test from *Jamieson* plus a new "reprehensible conduct" prong.

This Court had not revisited a major entrapment case until nine years later when it granted leave in *People v Maffett*, 462 Mich 919; 617 NW2d 333 (2000). After briefing by the parties and amicus, and hearing oral argument, the Court vacated its previous grant of leave to appeal in *Maffett*, 464 Mich 878; 633 NW2d 339 (2001). In her dissenting opinion from the vacation of leave, Chief Justice Corrigan set forth a thorough history of the defense of entrapment in both the United States and Michigan Supreme Courts.[3] She also concluded that "[t]he current state of Michigan law regarding the entrapment defense is unclear." 464 Mich at 878.

Later in 2001, the Court in the instant case once again directed the parties and others interested in this question to brief the issue of whether the Court should adopt the federal subjective entrapment test.

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[3] Amicus will rely upon the historical evolution of the entrapment defense as set forth in Chief Justice Corrigan's dissenting opinion and will not go into similar historical analysis in this brief.

The Attorney General as Amicus urges this Court to continue with the objective test of entrapment as set forth in the opinion of Justice Brickley in *Jamieson*.[4] While both the objective and subjective tests have major flaws, the opinion by Justice Brickley in *Jamieson* is a workable and clear statement of the law of entrapment, while incorporating aspects of both tests.[5] It is also imperative for this Court to set forth a clear and workable test for entrapment, and to avoid the fractious result as occurred in *Juillet*, which had caused much confusion and angst for the bench and bar.

2. **A brief statement of the entrapment defense.**

There are two standard tests for entrapment: The subjective test, which focuses on the predisposition of the defendant; and the objective test, which focuses on the conduct of the police. Federal courts, as well as most state courts, follow a subjective test derived by the United

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[4] Justices Riley and Boyle concurred with Justice Brickley. Justice Griffin, concurring and dissenting in part, noted his disagreement with the defense of entrapment generally and stated that until the defense is eliminated, he prefers and will associate himself with the test articulated by Justice Brickley. Therefore, because a majority of the justices associated themselves with the Brickley opinion, the people will hereafter refer to the Brickley opinion in *Jamieson* as the majority opinion.

[5] As noted by the majority opinion in *Jamieson*, principles of stare decisis do not permit alterations in a doctrine that "is serving well, and with which the bench, bar and public are satisfied." *Jamieson,* 436 Mich at 79 n 8. Accordingly, the Court in *Jamieson* remarked that "[w]e do not . . . find this Court's commitment to the objective test to be so undermined by time or circumstances that it should be discarded. We have been persuaded. . . that stare decisis should carry the day." *Id.* at 80.

States Supreme Court. Most academic commentators, as well as the Model Penal Code, and the Brown Commission Report[6] favor the objective test.

The subjective test is based on the majority opinions of several principal cases decided by the Supreme Court of the United States, e.g., *Sorrells v United States*; *Sherman v United States*; *United States v Russell; Jacobson v United States*, 503 US 540; 112 S Ct 1535; 118 L Ed 2d 174 (1992).

Under the subjective test, entrapment occurs "'when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.' " *Russell*, 411 US at 434-435; 36 L Ed 2d at 375, (quoting *Sherman* at 372, quoting from *Sorrells* at 442).

The subjective test focuses upon whether the defendant had the requisite predisposition to commit the crime. If defendant had such predisposition, then the origin of the intent to commit the offense rested with defendant even though the criminal act may have been the product of creative law enforcement efforts. Setting a trap for the "unwary criminal" is not impermissible police conduct. The purpose of the focus upon the subjective intent of the defendant is to determine whether defendant was an innocent person lured into committing the crime, as opposed to the police merely providing an opportunity to the "unwary criminal."

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[6] In 1966 Congress created a bipartisan National Commission on Reform of Federal Criminal Laws, to review the condition of the federal criminal laws. Former California Governor Edmund G. Brown chaired the commission and issued its final report to the president in 1971, proposing the replacement of the existing federal criminal laws with a new systematic code similar to the Model Penal Code. The Commission's report proposed the following objective test of entrapment in § 702(2): "Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment." See Moore, *The Elusive Foundation of the Entrapment Defense*, 89 NW U L Rev 1151, 1168 n 111 (1995).

The current test for entrapment in Michigan is based on the objective standard. "The overall purpose of the entrapment defense is to deter the corruptive use of governmental authority by invalidating convictions that result from law enforcement efforts that have as their effect the instigation or manufacture of a new crime by one who would not otherwise have been so disposed." *People v Juillet*, 439 Mich at 52. The purpose of the objective test "is to prohibit reprehensible governmental methods and practices in the obtaining of a conviction." *People v Jamieson,* 436 Mich at 72. The objective test does not seek to protect the innocent person but rather "to prohibit unlawful governmental activity in instigating crime." *Id.* at 73 (quoting *Turner* at 20, quoting *Russell* at 442).

The Court in *Jamieson* summed up the difference between the two different tests:

> Both tests have as their purpose the eradication of convictions that result more from law enforcement invention than from law enforcement detection. The extremes range from a need for the courts to supervise the activities of another branch of government to the need only to determine whether the offender was influenced by unsavory law enforcement techniques. The objective test looks for and condemns those police methods that are more likely to result in the motivation of criminal activity without regard to whether the offender at hand was predisposed to criminal activity, whereas the subjective test focuses on the offender to determine whether there was actual predisposition, regardless of the law enforcement measures employed.

Jamieson at 78.

Amicus will discuss the objective test in more detail later in this brief.

3. **The nature of the entrapment defense.**

The term "entrapment" is somewhat of a misnomer to describe this defense because "there is nothing whatsoever wrong or out of place in setting traps to catch those bent on crime, provided the traps are not so arranged as likely to result in offenses by persons other than those likely to commit them." Perkins & Boyce, *Criminal Law*, (3rd Ed), p 1161.

Nor is it a defense as much as it is exoneration for admitted criminal conduct. Webster, *Building a Better Mousetrap: Reconstructing Federal Theory From Sorrells to Mathews*, 32 Ariz L Rev 605, 607 n 5 (1990).

Regardless how it should be designated or classified, the entrapment defense does not appear to be grounded in the United States Constitution or based on the constitutional rights of the defendant, insofar as the standard subjective and objective tests are applied. [7] See e.g., *Sorrells v United States, supra* at 448 (entrapment is a matter of legislative intent) and 457 (entrapment is a measure to protect the Court's own integrity and "purity of its own temple"—Roberts, J concurring); *United States v Russell, supra* at 430-431, 433; *People v Maffet,* 464 Mich at 893 (Corrigan, CJ dissenting); *Jamieson, supra* at 98 n 2 (Griffin, J, concurring in part

[7] The United States Supreme Court has yet to recognize a due process-outrageous conduct test separate from the subjective measure of entrapment. See discussion at subsection 8, *infra*.

the crimes willingly, in private, and usually produce no complaining witnesses. [8] Accordingly, law enforcement personnel must actively seek out the commission of these offenses. The struggle over the entrapment defense is therefore a struggle over the "judicial reaction to the means used by the police to achieve presence at such illegal transactions, either in person or through the agency of informers." DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 USFL Rev 243, 250-251 (1967).

The Model Penal Code in its commentary to Art 2, § 2.13 (entrapment), p 408, recognizes that good police work necessarily requires the police to achieve presence during these types of transactions:

> The principal difficulty in defining the police conduct that gives rise to the defense has rested in the fact that some tactics employing misrepresentation and persuasion are necessary to successful police work and ought not to be forbidden. In many cases the need for techniques of this sort clearly overbalances the risk that the innocent may be induced to offend.

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[8] The defense of entrapment should not be made available to anyone charged with having caused or threatened to cause bodily injury to another. See American Law Institute, Model Penal Code and Commentaries (1985), Article 2, § 2.13(3), which disallows the defense of entrapment where defendant is charged with causing or threatening bodily injury:

> (3) The defense afforded by this section [entrapment] is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person *other than the person perpetrating the entrapment.*

The commentary to this section of the Model Penal Code explains that any person who can be persuaded to cause great physical injury to another presents a danger to society that should be punished, and much of the reason for the defense of entrapment disappears. Model Penal Code, comment to Art 2, § 2.13, p 420. Even assuming that the defense of entrapment were available to a defendant under these circumstances, the threshold level of entrapment in that instance should be much higher for crimes that involve the physical endangerment of others than it is for victimless crimes. The protection of society demands no less.

The commentary concludes that "[t]he law must therefore attempt to distinguish between those deceits and persuasions that are permissible and those that are not." *Id.* The subjective and objective tests represent "fundamentally divergent approaches to the attempt to draw the line between those deceits and persuasions that are permissible and those that are not." Model Penal Code, comment to Art 2, § 2.13, p 411.

Generally speaking, the subjective test tends to be concerned with the police implanting "in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells,* 287 US at 442. The subjective test in essence seeks to determine if the defendant is a person who is otherwise innocent of the offense that was the product of creative activity of the police. *Id.* at 451. Consequently, the focus of the test is upon the character of the particular defendant and whether based on his background and predispositions, he would likely have committed the offense without police inducement if given the opportunity. See Model Penal Code, comment to Art 2, § 2.13, p 411. If the defendant were so predisposed to commit the crime anyway, he will not be acquitted, despite the tactics used by the police.

By contrast, the objective test is based on the guiding principle that the defense of entrapment is not meant to protect persons who are otherwise innocent but rather to prohibit unlawful police activity in instigating crime. *United States v Russell,* 411 US at 442 (Stewart, J dissenting); *Jamieson* at 73. The objective test generally measures acceptable police conduct by focusing upon the police conduct alone, using an objective standard of reasonableness in which the character or predisposition of the defendant is irrelevant. Model Penal Code, comment to Art 2, § 2.13, p 411. "The crucial determination is whether the actions taken by government officials would be likely to tempt to criminality those who were not already predisposed to that end." *Id.*

While it might appear to be an "either or" choice between these two different tests, there is a third choice that would combine the best of both tests into what is generally referred to as the "hybrid" test of entrapment. This is the test from the majority opinion in *People v Jamieson*. The People urge this Court to re-affirm the *Jamieson* test.

4. **The hybrid objective-subjective test of Jamieson.**

In 1990, this Court in *People v Jamieson* reviewed the question of whether the state should switch to a subjective standard. In electing to continue to adhere to the objective standard, the majority opinion combined elements from both the objective and subjective tests to form essentially a hybrid of the two. The Court in *Jamieson* utilized the following objective test of entrapment:

> The facts of each case must be examined to determine whether, under the circumstances, the governmental activity would induce a hypothetical person not ready and willing to commit the crime to engage in criminal activity.

Jamieson at 80.

Nevertheless, in electing to retain the objective test, the Court in *Jamieson* observed that the defendant's state of mind is a factor to be used in applying the test, such that "consideration is given to the willingness of the accused to commit the act weighed against how a normally law-abiding person would react in similar circumstances." *Id.* at 74. In his opinion in *Juillet*, Justice Brickley noted that the term "normally law-abiding person" is equivalent to a person not ready and willing to commit the crime. *Juillet* at 54. Consideration of defendant's state of mind is, therefore, a permissible factor to consider even under the objective test of entrapment in Michigan under *Jamieson*, because, as noted by the majority opinion in *Jamieson,* the objective measure of entrapment under the objective test is not applied in a judicial vacuum.

The *Jamieson* opinion recognized that as a matter of practicality, the application of the two theories of entrapment overlap, and hence the best of both tests can, to some extent, be utilized. *Jamieson* at 74, 79. The fact that defendant was a person who was ready and willing to commit the crime when merely provided the opportunity to do so under the circumstances is therefore a relevant consideration under the objective test of entrapment.

Justice Brickley in *Juillet* also stressed that his entrapment test would bar "evidence of the defendant's predisposition, such as prior convictions or activities *not related to the circumstances involved in the current case*." *Juillet* at 56 (emphasis added). The corollary is that the defendant's predisposition is admissible where is *does* relate to the circumstances of the case (*i.e.*, where it bears on whether defendant would have committed the offense without the police inducements).

Additionally, the test used in *Jamieson* incorporates a causality requirement, in that there must be a link between the police or informant's conduct, and the defendant's commission of the offense. The law enforcement conduct must have induced the defendant to commit the offense. See *Juillet* at 54 n 5, 59.

The majority opinion in *Jamieson* also succinctly set forth the procedural requirements and burden of proof for an entrapment hearing, as well as the standard of review of the trial court's decision on the matter:

> When an accused claims entrapment, the trial court must conduct a separate evidentiary hearing to resolve the issue. The defendant bears the burden of proving by a preponderance of the evidence that law enforcement officials engaged in reprehensible behavior to obtain a conviction. The facts of each case must be examined to determine whether, under the circumstances, the governmental activity would induce a hypothetical person not ready and willing to commit the crime to engage in criminal activity. The trial judge's findings on the issue are subject to appellate review under the clearly erroneous standard.

Jamieson at 80.

Thus, under the objective test, the issue of whether the police conduct amounted to entrapment is solely a question of law for the trial court to decide in an evidentiary hearing outside the presence of the jury. *People v D'Angelo*, 401 Mich. 167, 176-178; 257 NW2d 655 (1977). The issue is never to be presented to the jury under any circumstances. *Id.* at 178-179. Once a trial court determines that no entrapment occurred, the jury will not be permitted to decide this issue, and the defendant will not get a "second bite of the apple" to second-guess the trial court's entrapment decision. *Id.* The jury's role is limited to determining whether the People have proved the defendant's guilt beyond a reasonable doubt in light of the defenses—apart from entrapment—raised. *Id.* at 179. Moreover, the defendant's testimony at an entrapment hearing will not be admissible as substantive evidence in the prosecution's case in chief, but only for impeachment if the defendant should subsequently testify on a material matter inconsistent with his entrapment hearing testimony. *Id.* at 178.

By contrast, under the subjective test, the ultimate issue is one decided by the jury. Because the issue under the subjective test is the determination of the defendant's predisposition to commit the offense, the prosecution is permitted to introduce evidence of the defendant's prior acts, and reputation for committing similar offenses. Both United States Supreme Court Justices Frankfurter and Stewart spoke of the dangers of allowing such prejudicial evidence at trial. *Sherman v United States*, 356 US at 382; *United States v Russell*, 411 US at 443 (the subjective test "permits the introduction into evidence of all kinds of hearsay, suspicion, and rumor—all of which would be inadmissible in any other context—in order to prove the defendant's predisposition." Stewart, J. dissenting).

Another concern with the subjective test is that once the jury decides the case, there is no guidance to the police for future conduct. As Justice Frankfurter explains in his concurring opinion, "a jury verdict, although it may settle the issue of entrapment in the particular case,

cannot give significant guidance for official conduct for the future. Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of criminal justice demands." *Sherman* at 385.

The trial court that decides an entrapment claim under the objective test will provide its reasoning for its decision, and the trial judge's ruling is subject to appellate review. The appellate courts on appeal can further refine the application of the entrapment and give the police guidance. Accordingly, the objective test has distinct advantages over the subjective test.

5. The hybrid objective-subjective test of entrapment should not be grounded upon a judge's subjective belief that a police officer or informer's conduct was or was not reprehensible or offensive.

Beginning with *People v Saunders,* concurring justice Marston determined that the conduct of the police officer in not immediately arresting the defendant was in his opinion "utterly indefensible." *Saunders*, 38 Mich at 221-222. Justice Campbell, also concurring, found the police conduct to be "scandalous and reprehensible." *Id.* at 223. The majority opinion in *Jamieson* specifically commented on this very point about *Saunders* and the judicial rhetoric about reprehensible law enforcement, when it questioned whether such rhetoric could have flowed so easily if the drug phenomenon existed a century ago. *Jamieson, supra* at 88. The *Jamieson* opinion concluded that the police conduct questioned in *Saunders* is now standard police operating procedure and would not substantiate a finding of entrapment. *Id.* at 89. Nevertheless, the Court found that "the rhetoric supporting the *Saunders* decision continues to be employed to condemn some law enforcement practices that on their face are nothing short of good law enforcement techniques." *Id.*

The proper measure of police conduct, in relation to the objective test of entrapment, must be based on more than a judge's belief that the conduct in question should or should not be

considered "reprehensible" under the circumstances. The question then becomes, what is the proper measure of police conduct under the objective test? The majority decision in *Jamieson* has answered this question and provided the one true measure of police conduct amounting to entrapment:

> The facts of each case must be examined to determine whether, under the circumstances, the governmental activity would induce a hypothetical person not ready and willing to commit the crime to engage in criminal activity.

Jamieson at 80.

Although this test is grounded in language from Justice Stewart's dissent in *United States v Russell, supra*, as reflected in *People v Turner, supra*, there was language in both *Russell* and *Turner* that mentioned that the police conduct was "reprehensible under the circumstances." The language "reprehensible under the circumstances" was at most a rationale for the objective entrapment test. It was not the test of entrapment itself. As will be discussed shortly, many decisions from the Court of Appeals used this language as the test for entrapment and thus have confused the proper measure of police conduct.

The majority's opinion in *Jamieson* should put to rest the proper measure of police conduct under the objective test. Police work does not constitute entrapment merely because it is labeled "reprehensible" or "utterly indefensible." Rather, it is only reprehensible and utterly indefensible when the police have acted in such a way as to induce a hypothetical person not ready and willing to commit the crime, to engage in criminal activity:

> The dissent's view of the objective entrapment test has disregarded the fact that police work does not constitute entrapment merely because it is labeled reprehensible or utterly indefensible; rather, it is reprehensible and utterly indefensible when, in the words of Justice Potter Stewart, "the governmental agents have acted in such a way as is likely to instigate or create a criminal offense." *Russell, supra* 411 US at 441, 93 S Ct at 1647. See pp. 907-908 (Archer, J., dissenting).

Jamieson at 77-78.

The majority opinion in *Jamieson* further warned in response to the dissent's rationale for their version of the entrapment defense (vigilance against excess in our criminal justice system), "that our vigilance should also be against judicial excess which sees in the entrapment defense an opportunity to engage in far-reaching supervision of police investigative techniques and procedures unrelated to the driving force of the objective entrapment test which is whether such police conduct has as its probable and likely outcome the instigation rather than the detection of criminal activity." *Id.* at 77.

Many decisions in the Court of Appeals after this Court decided *People v Turner* have continued to utilize the "reprehensible under the circumstances" test or some variation to measure the police conduct under the objective test. These decisions utilize some variant of the "reprehensible" conduct measure in finding entrapment, [9] or, while citing the approved objective test, either apply a reprehensible conduct measure or rely on cases that do. [10] The upshot is that these decisions permit a judge to find entrapment merely because the judge subjectively finds the police practice in question "reprehensible." Therefore, those cases that used the reprehensible

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[9] *People v Soper*, 57 Mich App 677, 679; 226 NW2d 691 (1975), lv den 394 Mich 882 (found police tactics repugnant); *People v Stanley*, 68 Mich App 559, 563; 243 NW2d 684 (1976) (test--whether actions of the police were so reprehensible under the circumstances that court should refuse to permit conviction to stand); *People v Duis*, 81 Mich App 698; 265 NW2d 794 (1978). (reprehensible conduct test); *People v Larcinese*, 108 Mich App 511, 514; 310 NW2d 49 (1981) (reprehensible conduct test); *People v Rowell* , 153 Mich App 99, 105; 395 NW2d 253 (1986) (actions of the police and their informants were appalling).

[10] *People v Gratzer*, 104 Mich App 705; 305 NW2d 300 (1981), lv den 411 Mich 961 (relies on *Duis, supra*, and *People v Wisneski*, 96 Mich App 299, 303, 304; 292 NW2d 196 (1980), *lv den* 409 Mich 928 [police conduct in this case "must be examined to see if it was 'reprehensible under the circumstances.'" "real concern in entrapment cases is 'whether the actions of the police were so reprehensible under the circumstances...'"]); *People v Harding*, 163 Mich App 298; 413 NW2d 777 (1987) (relies heavily upon *Duis, Larcinese and Wisneski, supra.*)

measure or some variant of it are of questionable authority in light of this Court's holding in *Jamieson* and Justice Brickley's opinion in *Juillet*, which clarified the instigation prong vis a vis the manner in which the courts prior to *Jamieson* applied it.

6. The use of artifice and undercover informants to detect secret criminal activity is a permissible law enforcement technique.

The objective test of entrapment does not preclude the use of undercover informants as a means to detect criminal activity. *People v Alford*, 405 Mich 570, 590; 275 NW2d 484 (1979); *Jamieson* at 83; *People v Butler*, 444 Mich 965; 512 NW2d 583 (1994). Nor does the test necessarily preclude the use of artifice, stratagem, or deception by the undercover informant as long as the activity does not result in the manufacturing of criminal behavior. *Alford*, 405 Mich at 590; *Jamieson* at 69, 82.

Stated in positive terms, undercover informants may engage in conduct that is likely, when objectively considered, to afford a person ready and willing to commit the crime an opportunity to do so. *Alford* at 590.

Use of undercover informants may be the only way to detect some criminal acts carried out in secret, especially drug-related offenses. *Jamieson* at 82-83. In fact, drug offenses have only one practicable means of detection: " 'the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation.'" *Jamieson* at 83, citing *United States v Russell.*

Civilian undercover informants are generally persons with contacts in the drug culture. This Court has noted that these informers are commonly drug offenders themselves and are always going to be of questionable character and suitability. *Jamieson* at 84.

Thus, it should come as no surprise that some undercover informants might engage in unlawful and criminal behavior during the course of the investigation. Such criminal activity committed by an undercover informant does not in and of itself dictate a finding of entrapment. Rather, there must be a causal connection, at least under the "instigation" prong, between the actions of the informant and those of defendant that could induce or instigate the commission of a crime by one not ready and willing to commit it. *People v Moore*, 73 Mich App 514; 252 NW2d 507 (1977). Although *Moore* involved a police officer, the activities of a civilian undercover informant acting on behalf of the police are governed by the same standards as those of the police themselves. *People v Stanley*, 68 Mich App at 564.

7. The existence of the "indicia" of entrapment does not itself warrant a finding of entrapment.

To catalog all the numerous police and undercover activities that do not constitute entrapment would be an impossible task. Instead, the courts have identified traditional "indicia" of entrapment, or law enforcement actions that traditionally are associated with conduct that has been held to manufacture a criminal offense by the police. Perhaps one of the most confusing applications of the entrapment test for the courts is how to apply the various "indicia" of entrapment and what weight to give them. Entrapment as a matter of law is not demonstrated merely because the officer or informant's conduct falls within one of these indications. Rather, "the facts of each case must [still] be examined "to determine whether, under the circumstances, the governmental activity would induce a hypothetical person not ready and willing to commit the crime to engage in criminal activity." *Jamieson* at 80.

The Court in Jamieson outlined some of the various traditional indicia of entrapment:

1. Continued pressure
2. Appeals to friendship or sympathy

3. Threats of arrest
4. An informant's vulnerability
5. Sexual favors
6. Procedures that escalate criminal culpability

Jamieson at 89.

The Court of Appeals in *People v Williams*, 196 Mich App 656, 661-662; 493 NW2d 507 (1992), listed as many as 12 factors that may be considered in deciding a claim of entrapment:

> Reviewing the issue under the first prong of this test, we analyze the following factors to determine whether the government activity would induce criminal conduct: (1) whether there existed any appeals to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime with which he was charged; (3) whether there were any long time lapses between the investigation and the arrest; (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen; (5) whether there were offers of excessive consideration or other enticement; (6) whether there was a guarantee that the acts alleged as crimes were not illegal; (7) whether, and to what extent, any government pressure existed; (8) whether there existed sexual favors; (9) whether there were any threats of arrest; (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant; (11) whether there was police control over any informant; and (12) whether the investigation is targeted. *Juillet, supra* at 56-57. We examine the facts to determine whether the government activity would induce a hypothetical person not ready and willing to commit the crime to engage in criminal activity.

Amicus submits that several of these factors are inappropriately labeled as types of conduct that can induce a hypothetical law-abiding person not ready and willing to commit a crime to do so, and the courts have often misapplied them as well. Amicus will now discuss these inappropriately applied indicia of entrapment.

a) *Failure of the police to specifically target a suspect or have a reasonable suspicion before employing a plan to detect crime.*

The majority opinion in *Jamieson* held that the police do not need either a specific target or reasonable suspicion before employing a plan to detect crime. *Jamieson* at 93. "Thus, to even

suggest that the police need reasonable suspicion before institution of a plan to detect and prevent crime is to take the objective test beyond its appropriate limits." *Id.* at 93.

The alternative would be to impose a probable cause or substantial evidence requirement for selecting targets of an undercover operation. Such a requirement is, of course, unsupportable based upon the language cited in *Jamieson* .

In a case decided after *Juillet*, this Court in *People v Butler*, 444 Mich 965 (1994) reversed the decision of the Court of Appeals in 199 Mich App 474; 502 NW2d 333 (1993), in an order after granting leave and hearing oral argument. In *Butler*, a federal agent testified that he undertook an untargeted undercover operation, in which he sent word out on the street that he had cocaine for sale, and gave out his pager number. The defendant contacted the agent and over the course of several phone calls, they arranged a deal to do a cocaine transaction. The trial court denied the defendant's motion to dismiss on grounds of entrapment. The Court of Appeals reversed the trial court's decision partly on the basis that the agent's conduct amounted to an untargeted fishing expedition, citing *Jamieson*, *Juillet*, and *Duis, supra* for authority: "There is no indication in the record that the police had any knowledge that defendants were drug users or dealers; rather, [the federal agent] put the word out to the public at large that he had drugs for sale. Fishing expeditions are generally condemned." 199 Mich App at 480.

This Court summarily reversed the Court of Appeals decision, holding that "as found by the trial court, nothing in the conduct of the government in this particular case rose to the level of entrapment. Law enforcement officials did nothing more than to present defendants with the opportunity to commit the crimes of which they were convicted." 444 Mich at 966.

The prosecution's dilemma is succinctly expressed in 1 Gillespie, Michigan Criminal Law and Procedure (2nd ed), § 32.4, p 121-122:[11]

> A "whipsaw" of sorts is being applied to police investigations with regard to entrapment claims. Focussed investigations involving undercover operatives or informants are attacked precisely because an individual is targeted; *untargeted* operations, where, for example, an undercover officer simply makes known that he is available to either sell or purchase drugs, are attacked precisely because they are untargeted! (these operations being referred to as "virtue testing"). In truth, entrapment does not necessarily exist in either situation, and the untargeted nature of an operation weighs *against* any possible entrapment, and the prosecution should so argue.

(Emphasis in the original).

And so amicus does.

b) *Failure to supervise an undercover informant.*

Charging that the police investigation was inadequate is not a sufficient basis upon which to support a finding of entrapment. *Jamieson* at 77, 81-82, 86. This includes the supervision (or lack of it) of the undercover informant. *Id.* at 86.

The judiciary's task does not encompass passing judgment on the appropriateness of police investigative techniques in a particular case. Rather, this should be left to the discretion of law enforcement officials. *Id.* at 81. The particular scheme or plan used by the police is irrelevant when evaluating the defense of entrapment. The only relevant inquiry under the objective test of entrapment is whether the specific police conduct under review served to manufacture the crime (*i.e.*, it induced a hypothetical person not ready and willing to commit the crime, to engage in criminal activity), *Id.* at 82, or whether the police conduct was so

[11] The 1998 revised volume contains this same quotation at § 32.40, p 117 but also contains several ostensible misprints and is not therefore accurate as is the above quotation from the earlier volume.

reprehensible as to amount to a due process violation. *Juillet, supra*; *Fabiano, supra.* (assuming the continued validity of the "outrageous conduct" prong of the objective test).

c) *Escalation of criminal activity.*

Criminal defendants should not be permitted to "immunize" themselves from prosecution merely because they testify at an entrapment hearing that they were only a user of controlled substances, as opposed to a distributor. Regardless of a defendant's level of controlled substance sophistication, so long as the police or civilian undercover informants merely provide the defendant the opportunity to commit the offense, entrapment has not occurred. Otherwise, a defendant who is, for example, only a "user," will escape punishment if he purchases a greater amount of narcotics from the police or an informant, than his or her "usual" amount. The defendant would have nothing to lose when he chooses to escalate his buying or selling, where the person on the other side of the transaction is an undercover officer or informant.

In *People v Ealy*, 222 Mich App 508; 564 NW2d 168 (1997), the Court of Appeals rejected a claim of entrapment based on alleged police escalation of defendant's criminal culpability. The Court in *Ealy* explored the issue of "sentence entrapment," which is a term used where the police induce a person predisposed to commit a minor or lesser offense, into committing a greater offense, exposing the person to greater punishments. In *Ealy*, the Court of Appeals agreed with the trial court's assessment that the increase in the amount of drugs involved was merely "good and proper police work." *Id.* at 510. The Court determined that "the police did nothing more than present defendant with the opportunity to commit the crimes of which he was convicted. Although an informant told the police that defendant was capable of supplying a couple of grams of cocaine and defendant initially sold small amounts of cocaine to the undercover officer, defendant did not hesitate in selling the officer increasing amounts and

eventually sold him 250 grams of cocaine." *Id.* at 511. This Court should adopt the holding in *Ealy*.

d) *Vulnerability of the undercover informant.*

Pressure on the informant from law enforcement to work an undercover operation does not amount to pressure on the defendant, and thus is not entrapment. *Juillet* at 63 ("We think that the pressure on an informant, while perhaps offensive in its execution, does not amount to pressure on the defendant and does not change the context in which we judge whether the hypothetical or the actual defendant was entrapped.").

One still must look to the circumstances of the case to determine whether the informant had utilized methods that would have induced one not ready and willing to commit the crime, to do so. There are informants with no "pressure" on them (*i.e.*, no outstanding charges for which leniency can be bargained) who will engage in the improper inducements just as there are informants with outstanding charges who will not offer such inducements. The focus of the inquiry under the instigation prong must ultimately be on what inducements were made to the defendant, not on what inducements were given to the undercover informant. Certainly, the inducement to the informant will shed light on why the informant acted a certain way, but should not ergo be considered as an indicia of entrapment, especially without the required finding of causality between the informant's vulnerability and the defendant's conduct.

8. **The test for entrapment should not include a reprehensible conduct prong.**

In addition to the several and often-fractured opinions in *Juillet* regarding the "instigation" test, Justices Cavanagh, Levin, Mallet, Boyle and Griffin appeared to support an outrageous or reprehensible conduct test of entrapment that does not consider the effect of the

police conduct on a normally law-abiding person. The reasons supporting this second prong of the entrapment test were again varied and fractured.

With regard to the second prong of the new entrapment test formulated in *Juillet,* a review of the votes among the Justices reveals that the reprehensible conduct that would support a finding of entrapment must be "more reprehensible" than that in the instigation/inducement prong of the test. *Fabiano,* 192 Mich App at 531 ("the police conduct must be more reprehensible under the second prong than under the first").

> However, under the second prong, entrapment exists if the police conduct is so reprehensible that we cannot tolerate the conduct and will bar prosecution on the basis of that conduct alone, as discussed by Chief Justice Cavanagh and Justice Boyle in their respective opinions in *Juillet.* We would liken this to a due process violation. See *Id.* at 85-86.

Fabiano at 531-532.

Thus, the Court of Appeals in *Fabiano* concluded that the second prong of the entrapment test (reprehensible conduct test) requires the police conduct to rise to the level of a due process violation. *Fabiano* at 532.

Both Justices Boyle and Griffin wrote separate opinions and both would require a much higher degree of reprehensibility than the other three justices. Indeed, both Justices Boyle and Griffin held that even the extreme police conduct in *Juillet* did not amount to reprehensible conduct under the outrageous or reprehensible conduct prong of the test for entrapment (nor did it amount to entrapment under the inducement prong). Justice Griffin once again reiterated his views in *Jamieson,* and noted that the defense of entrapment should be eliminated "[u]nless the police conduct in a given situation is so reprehensible as to violate constitutional standards imposed by the Due Process Clause." *Juillet* at 110.

Accordingly, Chief Justice Cavanagh's plurality opinion (concurred by Justices Levin and Mallet) regarding the outrageous or reprehensible conduct prong of the entrapment test did not

garner enough votes to be controlling. In Chief Justice Cavanagh's view, "the entrapment doctrine is necessarily rooted in the concept of fundamental procedural fairness inherent in the Due Process Clause." *Id.* at 85. While acknowledging that the United States Supreme Court has hinted about a constitutional due process standard applicable to police conduct, he disagreed with the limited reading given to this notion by the United States Supreme Court, and would find the basis for his test to be rooted in the Due Process Clause of the Michigan Constitution, article 1, section 17. *Id.*

As the instant case demonstrates, the outrageous or reprehensible conduct prong of the test for entrapment invites the danger that judges will overstep the separation of power between the judiciary and the executive, and allow the judicial branch to become a super law enforcement agency, passing subjective judgments upon a particular law enforcement strategy used in a given case. As stated in *Jamieson*, it is not for the judiciary "to judge if a scheme or plan employed was the best or most effective way to detect criminal behavior." *Jamieson* at 82. Furthermore, the "defense of entrapment was not intended to be the remedy for any and all misconduct or neglect by the police and their agents." *Id.* Similarly, the United States Supreme Court stressed that the entrapment defense "was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." *United States v Russell*, 411 US at 435; *People v Maffett*, 464 Mich at 885; (Corrigan, C.J., dissenting from order vacating leave).

The outrageous conduct defense originated with the United States Supreme Court decision in *Rochin v California*, 342 US 165; 72 S Ct 205; 96 L Ed 183 (1952). In that case, three police officers without a warrant went to the defendant's residence based on some information that defendant was selling narcotics. They found the door to the house open and entered it, finding their way to the defendant's room, at which time they forced open the door

and saw the defendant sitting on the bed, upon which his wife was lying. The police saw two capsules on the nightstand and the defendant put them in his mouth. The police jumped on the defendant and struggled with him to retrieve the capsules, but were unable to extract them. The police took the defendant to a hospital and directed a doctor to pump the defendant's stomach. The doctor administered a solution through a tube into the defendant's stomach and caused the defendant to vomit. The two capsules were found among the matter defendant had vomited, and they were determined to have contained morphine. The defendant was convicted of possessing morphine.

The United States Supreme Court reversed the defendant's conviction on the basis that the police conduct violated the defendant's fourteenth amendment due process rights:

> This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents--this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.
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> * * *
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> On the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause.

342 US at 172, 174; 72 S Ct at 209-210, 210-211.

This defense is therefore not tied only to entrapment situations. The United States Supreme Court has grappled with the issue of whether police conduct in an entrapment situation could invoke the due process defense and has failed to come to any consensus on the question. In *United States v Russell,* 411 US at 431-432 the Court acknowledged that:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf *Rochin v California*, 342 US 165; 72 S Ct 205; 96 L.Ed. 183; 22 ALR2d 1396 (1952) the instant case is distinctly not of that breed.

In *Hampton v United States, supra*, the Supreme Court once again addressed this question but was unable to agree on a consensus. The defendant in *Hampton* urged the court to decide the question left open in *Russell* and claimed that his case met the outrageous conduct due process test. Justice Rehnquist in an opinion joined by Chief Justice Burger and Justice White, held that where the police act in concert with a defendant, the defendant's sole remedy lies in entrapment, which defense was not available to defendant Hampton because the defendant was predisposed to commit the offense anyway. The rationale for Justice Rehnquist's opinion was that the police did not violate any independent constitutional right of the defendant, and that the "limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the *defendant*" (emphasis in the original). *Hampton*, 425 US at 490. What is more, Justice Rehnquist's opinion construed *Russell* as ruling out the possibility that the entrapment defense (which it characterized as a "statutory" defense) could ever be based upon governmental misconduct where it was also established that the defendant was predisposed to commit the offense. *Hampton* at 488-489.

Justice Powell, joined by Justice Blackman, concurred in the judgment, noting that they disagreed with the due process question answered by the plurality opinion as an absolute rule. The concurring opinion did not agree that *Russell* foreclosed reliance on due process principles or on the Court's supervisory power to bar conviction because of outrageous police conduct in all cases, even where the defendant is predisposed. Justice Powell did, however, observe that such cases would be rare, and that "[p]olice overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction. This would be especially difficult to show with respect to contraband offenses, which are so difficult to detect in the absence of undercover government involvement. " *Id.* at 495 n 7.

Justices Brennan, Stewart and Marshall dissented, agreeing with Justices Powell and Blackman that *Russell* did not foreclose barring a conviction based on supervisory power or due process principles where police conduct is sufficiently offensive, and the defendant was predisposed. *Id.* at 497.

Thus, at least in theory, police conduct in encouraging or facilitating a defendant to commit crime could rise to a due process violation, but the threshold level to invoke this defense would be placed extremely high.

The federal circuits are divided on the issue of the outrageous conduct defense. The Sixth Circuit, however, has squarely held as a matter of law, that where government conduct induces defendant to commit a crime, even if it is labeled as outrageous, it does not violate the defendant's constitutional right of due process. *United States v Tucker*, 28 F3d 1420, 1426-1427 (CA 6, 1994).

The relevance of the foregoing discussion of the United States Supreme Court cases and the Sixth Circuit case of *Tucker*, is that if the federal subjective entrapment test for the most part does not recognize a reprehensible or outrageous conduct test, or at least places the bar beyond practical reach of the overwhelming majority of defendants, then surely such a test under Michigan's objective entrapment test would be redundant and misplaced. The outrageous conduct test makes more sense in the context of the subjective test, which measures whether the defendant was predisposed to commit the offense. If found to be predisposed, then regardless of the police conduct, the prosecution is not barred. The outrageous conduct defense was therefore developed to escape the notion that under the subjective test, "anything goes" as far as police conduct, so long as the defendant was predisposed.

Conversely, the outrageous or reprehensible conduct test has little validity under the objective theory of entrapment because the objective test measures the police conduct as part of

the test itself. Therefore, the safety net of an outrageous conduct defense under an objective test for entrapment is redundant.

Justice Brickley said it best in *Jamieson*: "police work does not constitute entrapment merely because it is labeled reprehensible or utterly indefensible; rather, it is reprehensible and utterly indefensible when, in the words of Justice Potter Stewart, 'the governmental agents have acted in such a way as is likely to instigate or create a criminal offense.'" *Jamieson* at 77-78.

This Court should not continue the reprehensible or outrageous conduct prong of the entrapment test, created out of the fractured opinions of the *Juillet* opinion.

C. Conclusion

As undesirable as it may seem to some, undercover informants must infiltrate the drug culture to expose its operations to the law. These informants engage in dangerous assignments and are typically of questionable character and stability. Occasionally, they may over-involve themselves in their undercover roles. The role of the judiciary in such circumstances is to determine whether the informant's conduct would have induced a hypothetical person not ready and willing to commit the crime to engage in criminal activity. In applying this test, the courts may consider the actual willingness of the defendant to commit the crime against how a normally law abiding person would have acted. A judge should not apply his or her sense of moral outrage to determine whether public policy should or should not tolerate such conduct. If the informant's conduct did not induce the defendant to act, then such conduct must be found to permissible, unless such conduct had violated the defendant's due process rights.

The best approach to balance these interests lies in the test set forth by the majority opinion in *Jamieson*, and to the extent consistent with that opinion, the Brickley opinion in *Juillet*. This test utilizes the best of both the objective and subjective standards, and does more to examine the entire transaction than either test does alone. This test answers the questions of what the police did, and what the defendant actually did in response and his intent in doing so. This court should also discontinue the instigation prong of the test from *Juillet*.

RELIEF

WHEREFORE, for all the foregoing reasons, Amicus Curiae, in support of the People of the State of Michigan, Plaintiff-Appellant, respectfully requests that this Honorable Court to reverse the decisions of the trial court and the Court of Appeals, and to remand this case to the trial court for trial upon two counts of possession with intent to deliver between 225 and 650 grams of cocaine, and to continue to use the objective test of entrapment as set forth in the majority opinion in *People v Jamieson*.

Respectfully submitted,

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